LOS ANGELES BAR BULLETIN

In This Issue

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LOS ANGELES
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POWER TO DESTROY

IT would appear that members of the legal profession in California might well expend a little energy in consideration of a possible legal curtailment of federal taxes. The lawyer has the reputation, deserved or not, for being in the front rank of those who would safeguard and protect the personal and property rights of the people. In my opinion, no better job could now be done by the organized bar and the individual lawyer than to support, earnestly and actively, the proposal of a constitutional amendment, the object of which would be the limiting of the power of Congress, in peace time, to tax incomes, inheritances and gifts.

The increases in such taxes, over the past few years, are well known to all. The lawyer, above all others, is thoroughly familiar with consequences thus far experienced and he can clearly foresee the results which will follow further increases. That there shall be further increases is certain. It takes but

little imagination and small knowledge of the subject to determine that the ultimate result can only spell an absolute destruction of the free-enterprise system, the elimination of the right to own private property and the encouragement of state socialism, communism, or some other form of economic dictatorship. In other words, we now have partial confiscation of property through our federal taxes, and unless a legal limitation is placed upon the taxing power of Congress, we shall have a total and absolute destruction of all private property rights. If and when that happens there shall be nothing left but an economic dictatorship in the form of socialism or communism. Not a pleasant prospect, is it? It is especially unpleasant to think of when we consider that this great country of ours has been builded upon the free-enterprise system and that the present war is being fought by our sons and daughters to safeguard that system and all it represents and stands for. What to do?

Several states* by legislative action, have adopted resolutions requesting Congress to call a constitutional convention to propose an amendment (twenty-second) limiting maxium peacetime federal income, inheritance, and gift tax rates to twenty-five per cent. Such amendment, of course, must be ratified by the states. While thirty-two states can compel the calling of a convention, it is hoped by the proponents that popular demand will induce Congress to propose the amendment and submit it to the states for ratification, which has been the method followed in all previous cases.

While it is apparently true that several legislatures of those states which so requested Congress have rescinded their earlier action, they must have been influenced in so doing by political pressure and war conditions and by reason of the patent apathy on the subject which exists throughout the nation (witness the lack of interest in California). I am advised that the proposal was introduced in, but failed to pass, the California legislature. If that be true, our legislative representatives kept the matter rather well cloaked in secrecy as I must admit that I never heard of the proposal and doubt that few others did. Such a

*Alabama, Arkansas, Delaware, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Wisconsin and Wyoming (Arkansas, Kentucky and Pennsylvania have rescinded their action).

vital question should have publicity second only to the war itself! To "win the war and lose the peace" has become a rather hackneyed expression. I say, to win the war *and the peace* and suffer the destruction of our free-enterprise system will mean that all our blood and sweat and tears have been in vain; for America, as we know it and as our forefathers knew it, will have been lost forever.

The purpose of an editorial is to induce thought upon its subject and if thought will produce action this article, poorly constructed and written as it may be, has been a success. Space will not permit the presentation of the *pros* and *cons* which are, of necessity, to be found in the issues of the subject; and it is neither the desire nor the intention of the writer to argue here even those matters which, in his opinion, greatly favor the constitutional amendment. However, the proponents urge with "backed up" economic reasoning and facts:

1. The amendment would provide needed assurance, which statutory law cannot, against recurring abuse of the federal taxing power—the "power to destroy."
2. The amendment would increase the national wealth and, over the years, the federal revenue.
3. The amendment would aid in saving our free-enterprise system.
4. The amendment would free the states from federal domination and aid in preserving our present form of government.

The reader may not agree with all of the four points set forth above, and point 2 may appear to be a most startling statement. However, logical and convincing argument can be made in support of each point and no lawyer would (or should) condemn without full study of the complete subject. That study remains for the individual or the committee of the organized Bar if sufficient interest be aroused by this article.

Outside of the C. I. O., the Treasury Department is the strongest opponent of the so-called 22nd Amendment and states its reasons for its opposition, in part, as follows:

1. The amendment "would eliminate the prospect of a budget surplus and make a deficit probable even in a prosperous year."
2. "Progression in income tax rates would be almost entirely obliterated," and it would be necessary to try to increase by

various tax adjustments, including among others the abandonment of "the specially favorable treatment of capital gains," and a possible resort to sales taxes and excises, with the prospect, however, that in spite of all efforts "a chronic deficit" would remain.

3. The net effect of the changes resulting from the amendment would be a deterrent rather than an incentive to business.

4. The effect upon the state and local governments would be harmful.

Those objections can and have been answered. A study of those answers will prove both helpful and interesting, if not convincing. Again, the space allotted does not permit us the opportunity of herewith setting forth all or some of those answers; but, they are available to those interested.

But admitting all here written, why it may be asked, do we need a constitutional amendment?

In answering that question I shall take the liberty to adopt the answer of one much better informed upon the subject than I:† "We need it for the simple reason that oftentimes in the past Congress has disregarded these fundamental principles and there can be no assurance that it will refrain from doing so in the future, unless it is restrained by the Constitution. This is the only effective way to safeguard the nation against the destructive effects of excessive taxation. The Constitution is filled with curbs on the power of Congress, which were placed there to protect the people's rights; such, for example, as freedom of religion, freedom of speech, freedom from unreasonable searches and seizure, and freedom from being deprived of life, liberty or property without due process of law. Excessive taxation would render these rights of little value. There is no curb more important to the people than the one of taxing power. Congress should no more have unlimited power over one's property than over his person; for, in the language of Chief Justice Marshall, 'The power to tax involves the power to destroy.'"

It is to be remembered that in writing this article I do not contend for nor do I support any action or measure which would impede or hamper the war effort. Nor do I wish to preach an economy of tax restrictions in war times if we would thereby

†Robert B. Dresser, Esq., of the Rhode Island Bar.

"cut off our nose." The proposed amendment would be effective only in peacetime.

The pressing for the proposed amendment will be quite unpopular in certain quarters. So were other matters which have become our very national life-rafts. A lawyer must decide to "go along with the times" or hold to common buggy-horse sense that existed yesterday and will exist forever. He must become a collaborator with Machiavelli and sell his very soul for security, peace and freedom from criticism, or take his stand—once and for all and come what may—on what is right and fair and reasonable and just. The time is now. What, if anything, are we going to do about it?

GEORGE M. BRESLIN.

[Editor's note: The Bulletin invites readers who disagree with the views expressed by Mr. Breslin to submit for publication articles of editorial length.]

A WORD FROM THE PRESIDENT

As of April 26, 1945, our Bar Association had the following membership:

Active Members	1868
Honorary Members	25
Non-resident Members . . .	23
Affiliated Members	195
Total	2111

Of this formidable total only 215 are sustaining members!

It costs money to run any enterprise; and the Los Angeles Bar Association is no exception. While our present financial condition is sufficient, for the moment at least, to enable us to "get by," it is by no means what it should be. As a matter of ordinary business prudence we should increase our funds to a point where we can easily meet all financial demands and still hold a comfortable sum in reserve. This can easily be brought to pass if every member, who can, will take out a sustaining membership.

If you are not already a sustaining member I urge you to become one; the Association needs your financial support.

Alexander Macdonald

BY THE BOARD

Junior Barristers' Officers: The Junior Committee of the Association has selected, and the Board of Trustees has confirmed, the officers chosen by the Juniors for 1945 as follows:

Chairman	Donald A. Dewar
First Vice-Chairman . . .	Rollin Woodbury
Second Vice-Chairman . .	William H. Brainerd
Secretary-Treasurer . . .	A. R. E. Roome

* * *

Federal Judges: The Board passed a resolution approving an increase of $5,000 a year in the salaries of all federal judges, as proposed in pending bill in Congress (HR No. 2181). The resolution recites that there has been no increase in salaries paid federal judges in the last 20 years. Meanwhile, income taxes have been imposed on their salaries, and there has been a very substantial increase in the cost of living. Such an increase would have the effect, says the resolution, of restoring to federal judges' income the approximate amount taken therefrom by income taxes and increased living costs. Copies of the Resolution were sent to U. S. Senators from California and to Representatives from Los Angeles County districts.

* * *

Securities Act: The Association's Special Committee on Jurisdiction of Corporation Commissioner, Earl C. Adams, Chairman, recommended that the Board approve HR 5429 and S 62, now before Congress, increasing the exemption of security issues not exceeding $300,000 from the provisions of the Securities Act of 1933. The Board voted that the recommendation of the committee be adopted and that a communication be sent to senators from California and members of the House from Los Angeles County, advising them of the action taken.

* * *

Municipal Court Judges' Salaries: The Board, following a report made by the Association's Committee on the Judiciary with respect to an increase in the salary of municipal court judges, voted that it favors an increase in salaries of

judges of said court, but took no definite stand as to the amount. A bill now pending provides for an increase from $8500 to $10,000 a year.—E. D. M.

COMMENT AND CRITICISM

Lawyer War Casualties: The latest published record of casualties among State Bar members in the armed services, list 25 killed in action or in line of duty; 5 missing in action, and 6 prisoners of war. The maximum number of State Bar members in all branches of service at one time was 2485. To date about 200 have received honorable discharges from the Army, Navy, and Marines.

* * *

No 1945 Convention: The Board of Governors of the State Bar has decided that no meeting in the nature of a convention will be held this year, unless there is a radical change of conditions. This is a wise and proper decision under present conditions. But members sadly miss the once-a-year get-together meetings. There may be regional conferences of delegates to the Conference of State Bar Delegates, to discuss the legislative programs of the State Bar.

* * *

Prizes: ABA announces a prize contest, open to all members, except officers, for the best statement of Principles, or Creed, on (a) The Responsibility of the Citizen as a Voter, and (b) The Responsibility of the Citizen as a Juror. First prize, $500; second, $250; and third, $100. Limited to 250 words You can write on either one or both topics. Papers must be in before May 15, 1945, addressed to Committee on American Citizenship, ABA, 1140 North Dearborn St., Chicago.

* * *

Danger: President of Fort Worth Bar Association thinks there's danger of the "Fourth branch" of Federal Government—*i.e.*, bureaucratic agencies, taking over the functions of courts, and warns lawyers to do their best against it. Well, our publication, The BULLETIN, has had a lot to say on

the subject over a long period. Not much can be done about it during the war, but afterward, if the trend continues, there will be organized action a-plenty.

* * *

Utopia! Down in New Zealand every law office, along with many business concerns, close tight for three weeks for the Christmas holidays. Also, individual law libraries are kept up to date by men who travel about and annotate your books, pasting in the names of cases which have been cited. —E. D. M.

WHAT KIND OF PEACE?

By Frank G. Tyrrell, Judge of the Municipal Court

WHETHER the war ends in a few months, a year, or several years is a matter of deep concern to us all. Every day piles up the staggering costs in blood and treasure. To shorten it by twenty-four hours will be to save perhaps thousands of precious lives.

Let us first be sure that we understand what we are fighting for. The war is not of our making; it was forced upon us. Long before the Japanese onslaught on Pearl Harbor, it had become a threat to the United States, and to the rest of this hemisphere; but it was hard to realize that we were endangered.

Germany set out to conquer and rule the world, not for the welfare of other peoples, but solely for her own aggrandizement and enrichment. For a time the Nazi juggernaut rolled on without hindrance. All Europe fell before them. The determined purpose and policy are illustrated by what has happened there. The people have been tortured, murdered, enslaved, and robbed. Today it is reported that there are twelve million foreigners in Germany at forced labor for the benefit of the German nation. No wonder the Nazis have shown vast recuperative power, replacing instantly all material destroyed by Allied bombing and gunnery.

The conquest of Europe was of course to be followed by the conquest and subjugation, one by one, of all other nations. Next on the list was Russia, because that was nearest. Then in due course others, till the world lay subdued to a German hegemony.

No one at all familiar with German philosophy and politics

for the last hundred years will dispute this statement of the present purpose of the German warriors. It doubtless suggested the Allied purpose to wage war to an unconditional surrender, as it also justifies that purpose.

That is not the whole story. We do not understand this paroxysmal war until we realize that the crazed Nazis, faced with ultimate defeat, already are planning to maintain their organization, go underground, and carry on in preparation for another attempt to subjugate and enslave mankind.

In other words, we fight for all the freedoms which have been bequeathed to us through centuries of struggle against despotic kings and governments. The liberties enshrined in the Declaration of Independence and the Bill of Rights—all are in jeopardy, and all would be lost to us and our posterity by a Nazi victory.

It seems incredible that any civilized State could form such a purpose. But it can be explained by the silly—the lunatic—notion of the Nazis that they are a superior people, destined to lead the world, to subdue the world, and to rule it for their own increase and comfort. They are unmatched, if you please, unequaled; and since they are so wondrously gifted with this race superiority, they propose to be the sole and supreme rulers of the earth.

This is entirely logical; but it is the fatal logic of fanaticism, which of course is a species of insanity. But it is something we cannot afford to ignore or forget. The Allies are pitted against men so obsessed with mystic dreams of racial purity, racial superiority, and racial destiny that they are crazy. Not therefore easily subdued, but possessed of all the Satanic cunning sometimes shown by the demented, they are a most wily and dangerous foe.

What kind of peace shall we make with such a foe? Plainly, nothing but a peace of justice will suffice, now and for all time to come. And where shall we look for the formulation of its terms? Where indeed, except to the legal profession? There is a wide range for the exercise of the best thought of lawyers and judges, but nowhere is it so vital, urgent, and commanding as here. It calls not only for the finest statesmanship, but for the superb technical and scientific knowledge of men of the law. It demands first and above all, the arrest and condign punish-

ment of the murderers, arsonists, and rapists who have degraded and disgraced themselves beyond all hope of redemption. The war criminals must be arrested, arraigned and tried. This is an imperative 'first' in any tolerable or enduring peace.

And then, the entire people must be re-educated. They must be made to unlearn the lunatic lore with which they have been indoctrinated. And until that is accomplished, they must be kept relentlessly under tutelage. This is the hardest task, much harder even than to ferret out, try, and condemn the miscreant murderers and despoilers. If grim humor is not malapropos, recall the story of the German father who had chastised his wayward son. "Now what you tink? You tink 'damn it' and I lick you for that." And again he laid on the lash.

This task of re-education and re-training a people is but part of the inescapable moral obligation of nation to nation, of people to people. Hitherto, in spite of judicial deliverances from time to time, nations have paid but slight regard to the moral law. In human affairs of all sorts and sizes, it is of eternal validity, and its disregard and flagrant infraction will in time bring its own punishment.

There is a most heartening interest and activity in the organized bar with respect to all the problems raised by the movement for world security and justice. No matter what it might cost them, the leading lawyers and jurists of the American Revolution consecrated themselves to the great work of framing a charter of government, and their splendid work abides. Now in this world revolution, their successors are summoned to an even more difficult task; and they will not fail!

RESTRICTION OF AMERICAN INVESTMENTS IN MEXICO

By William B. Stern, Foreign Law Librarian, Los Angeles County Law Library

IN recent years the Mexican Government has taken numerous steps to combat inflation. Ceiling prices have been established and wages frozen. Of late, the investment of foreign funds has been curbed. These measures are not surprising if one considers the tremendous increase which has taken place in the economy of the republic-to-the south. Building, mining, manufacturing, and investments have seen an unprecedented boom. It is a true wartime boom. Prices have soared and manpower is relatively scarce. At least in part this boom is caused by the steady influx of American capital and purchasing power.

On June 29, 1944 (*Diario Oficial*, July 7, 1944), the Mexican Government issued a decree which is digested in the following paragraphs. It is, however, suggested that interested parties consult the detailed provisions of the decree itself.

(1) During the present war, foreigners and Mexican companies with foreign "associates" need the authorization of the Secretariat of Foreign Relations for the acquisition or control of Mexican business and manufacturing enterprises in the fields of industrial production, agriculture, livestock, timber, purchase and sale or improvement of city or rural land (including mining), and for the acquisition of real property for most any purpose, and for the acquisition of mining concessions, watercourses and combustible mineral substances, etc. Most of these restrictions also apply to leases of more than two years' duration and to trust arrangements if the trustee is a foreigner or a Mexican company with foreign associates.

(2) For the duration of the war, the authorization of the Secretariat of Foreign Relations is required for the formation of, or any transaction concerning, Mexican companies with foreign associates for any of the above-mentioned purposes.

The Secretariat of Foreign Relations has the discretionary power to deny or grant licenses conditionally or unconditionally. However, a license may be issued only if the applicant has his principal resources and investments and a residence in Mexico;

he may not be an enemy alien (Mexico has joined the war against Germany, Italy, and Japan). Companies must have at least 51 percent Mexican capital and the majority of the associates must be Mexican. However, this percentage and majority rule may be waived if the establishment of an industry is planned which is new to the Mexican economy.

Transactions contrary to the provisions of this decree are null and void and subject to expropriation and penal sanctions.

CRIMINAL APPEALS*

By Thomas P. White,
Associate Justice of the District Court of Appeal

Reviewing judges are, obviously, in no position to determine the credit which should be accorded to a witness or to weigh his testimony. As it has often been repeated, it is for that reason that our Constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact but purely one of law. In consonance with the spirit and intent of the provision, the legislature has ordained that the jury are the exclusive judges of the credibility of witnesses (C. C. P. §1847) and are the judges of the effect and value of evidence addressed to them except in those circumstances where it is declared by the law that it shall be conclusive proof of the facts to which it relates (C. C. P. §2061). And as a necessary corollary of the rules just noted, the jury in a given case, for instance, are authorized, if they conscientiously feel warranted in so doing, after full and fair consideration thereof, to reject any testimony and to accept testimony in contradiction thereof.

It has been held that, before a statement can be said to bear upon its face the brand of inherent imprabability, or may be said to be unbelievable *per se,* it must involve a claim that something has been done that it would not seem possible could be done under the circumstances described, or that it involves

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*This is the second and last installment of this article. The first installment appeared in the April, 1945, number of the Bulletin, page 252.—Ed.

conduct that no one but a person of a seriously calentured mind would be likely to do.

However, in support of my statement that a criminal appeal grounded on the claimed insufficiency of the evidence is not at all hopeless, I might cite the case of *People v. Nichols,* 52 Cal. App. (2d) 31 (1942).

In that case the judgment of conviction was reversed and a hearing denied by the supreme court. In the course of the opinion, the appellate court said that it was cognizant of the oft quoted rule which forecloses an appellate tribunal from disturbing the conclusion and inferences arrived at by the trier of facts upon conflicting evidence; that neither was the court unmindful of the rule that where the evidence, viewed in one light, creates a hypothesis inconsistent with guilt, and when viewed in another light such evidence is reasonably consistent with guilt, and where the jury, or as in that case the trial judge, rejects the hypothsis pointing to innocence, and there is evidence to support the implied finding of guilt as the more reasonable

of the two hypotheses, the appellate court is bound by the finding of the trial court or jury. But, said the appellate court, it is axiomatic as well that an appellate tribunal may set aside the findings of the trial court when there is no substantial or credible evidence in the record to support them, or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict or decision as to convince the appellate court that its rendition was the result of passion or prejudice upon the part of the trier of facts; that when the case presents any of these features the appellate court deals with it as a matter of law.

In the *Nichols case,* the court conceded that such a situation possibly can only be presented on appeal in extreme cases, but reached the conclusion that the evidence amounted to no evidence at all, as a matter of law, sufficient to overcome the presumption of innocence and to meet the burden resting upon the prosecution to establish guilt beyond a reasonable doubt; that the evidence did not bear that degres of reasonableness or substantiality required to give to it the probative force necessary to sustain the findings of guilt by the trial judge.

Again, in the case of *People v. Flores,* 58 Cal. App. 2d 764, the appellate tribunal, in holding that the evidence was insufficient to support a guilty verdict, more or less summarized the rule in question by saying "No man's liberty should be taken from him upon such a flimsy showing as characterizes the evidentiary features of this case."

With reference to when the question of insufficiency of the evidence in criminal cases ceases to be one of fact over which the trial judge has full jurisdiction, and passes into the realm of a "question of law" over which the appellate tribunal has jurisdiction, I think this may be epitomized by saying that the sufficiency of the evidence becomes a question of law only where the question is whether there is any evidence to support the verdict, or when the evidence is so unsubstantial as to practically amount to no evidence.

Here I might pause to say that one of the most prolific causes of injustice is the reluctance of trial judges to grant a new trial on the ground of insufficiency of the evidence. As far

back as the case of *People v. Tapia,* 131 Cal. 647 (1901), it was said "He [the trial judge], too, had to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict; if he was not, it was not only the proper exercise of the legal discretion, but his duty, to grant a new trial." The danger that a miscarriage of justice may occur is intensified by such remarks made from time to time by the trial judge as "We will let the appellate court pass upon it," which we sometimes find in records on appeal.

I come now to the consideration of a question which arises so often in criminal appeals,—and that is the application of Sec. 4½ Art. VI of our State Constitution—so often referred to as the "handmaid of the District Attorney." It seems to me that much confusion has arisen of and concerning this constitutional provision. It is not my understanding that the provisions thereof are intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. (*People v. Davis,* 210 Cal. 540, 556). As was said in *People v. Wilson,* 23 Cal. App. 513, 524,

> "The phrase 'miscarriage of justice,' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' (Opinion written by Mr. Justice Sloss in People v. O'Bryan, 165 Cal. 55."

When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. (*Powell v. Alabama,* 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527).

In criminal cases on appeal the appellant must not only show errors on the part of the trial court but must also assume the burden of showing resulting prejudice to his substantial and legal rights. However, if prejudicial errors are shown, Sec. 4½ of Art. VI will not save the conviction where the appellate court is

unable to say, as pointed out in *People v. Degnen,* 70 Cal. App. 567, "whether appellant would or would not be convicted but for the errors of the court."

The case of *People v. Black,* 73 Cal. App. 13 (1925), at page 43, contains this timely and still salutary admonition:

> "In closing, we feel impelled to direct the attention of district attorneys and trial judges to the frequent occasion which is thrust upon us to save judgments of conviction by means of the provisions of section 4½ of article VI of the constitution. It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the section. It should be manifest that such a course is improper. In the performance of their respective duties incident to trials, the existence of the section is of no concern to those officers. That part of the organic law of the state is of interest, so far as its application is concerned, if we except proceedings on motion for a new trial (see People v. Tomsky, 20 Cal. App. 672), only to the courts of review. District attorneys and trial judges should conduct the trial of criminal cases exactly as if the section did not exist. Such a course, if faithfully and diligently pursued, will lessen the number of appeals, will shorten the time necessary for the consideration of appeals which are taken, will lessen the number of retrials by superior courts, and will conduce to the general dispatch of business in both trial and appellate courts."

It might not be amiss at this point to remind counsel in criminal cases that where no judgment is pronounced, and prior to the rendition of any judgment, the proceedings are suspended and the defendant placed on probation, he is thereby deprived of his right to appeal, except from the order denying his motion for a new trial, provided such a motion is made. Where, however, a judgment is pronounced, the defendant may prosecute an appeal therefrom notwithstanding execution of such judgment is suspended and the defendant placed on probation. (*People v. Casillas,* 60 Cal. App. 2d 785; *People v. Murphy,* 60 Cal. App. 2d 762, and cases therein cited.)

The practitioners of criminal law, as well as the courts, are frequently confronted with applications for a writ of *coram nobis.* This, as you know, is a well established common law remedy, which was carried into the law of this state by force of Chapter 95 of the Statutes of 1850, codified as section 4468 of the Political Code. I shall not dwell at length upon the writ of *coram nobis* because its historical background, as well as its nature and purpose, both at common law and where permitted under our procedure in this state, are fully and aptly set forth by Chief Justice Myers in *People v. Reid,* 195 Cal. 249. However, I think it may

safely be said that when recourse is had to this rather unusual remedy under our procedure, the applicant therefor should be held to reasonable diligence in asserting his claim. For instance, where the situation was fully known at the time of the trial or was brought out on the motion for a new trial prior to judgment, the defendant should not be permitted to take his chances upon an appeal and then, following an unfavorable result, be allowed to urge his claim to a writ of *coram nobis* for the first time in order to have the whole proceeding gone over again on *coram nobis* when he either neglected to urge, or preferred not to urge the grounds prior to the prosecution and termination of his appeal. In other words, the maxim "For every wrong there is a remedy" (Pen. Code §3523) is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time—even though such failure occurred without fault or negligence on his part. This is made clear by the case of *People v. Mooney,* 178 Cal. 525; *People v. Superior Court,* 190 Cal. 624, and *People v.*

Reid, to which I have just referred. The power of the court in *coram nobis* proceedings must not be confused with the pardoning power of the governor.

The writ of *coram nobis* is designed to purify and keep pure the administration of justice, and was never intended to enable the guilty to escape punishment. Consequently, in so far as the facts of the case are concerned, I think it may be said that the writ will issue when a valid defense exists in the facts of the case, but which, without neglect on the part of the defendant, was not made either through duress or fraud or excusable mistake; these facts not appearing on the face of the record and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned. I would advise a reading of the case of *People v. Reid,* 195 Cal. 249.

We have had a number of appeals wherein error is imputed to the trial court for failure to give a cautionary instruction in sex cases. Since the case of *People v. Putnam,* 2 Cal. 2d 885 (1942), which reviews earlier cases, it would seem that in this

particular type of case the defendant is entitled to an instruction that the charges made against him are "easily made and difficult to disprove," and that the testimony of the prosecuting witness should be examined with caution, but the court is not required to give an admonition that the jury should view the testimony of the complaining witness with caution, because, as the supreme court points out, such an instruction would be inaccurate and misleading for it would convey the impression that, for undisclosed reasons, the trial judge distrusts the testimony of a particular witness. Finally, the court in the last cited case reiterates its declaration in *People v. Lucas,* 16 Cal. App. 2d 178, that a failure to give a cautionary instruction does not constitute reversible error where an examination of the record discloses that the evidence as a whole clearly points to the defendant's guilt. It would be well to read the *Putnam case* in framing cautionary instructions in sex cases.

With reference to writs of *habeas corpus* and the extent of their use, not only to test the constitutionality of a statute, but to review the procedure in petitioner's trial, even though the trial court has jurisdiction to try the petitioner and that any infringement of constitutional rights during a trial may be raised on appeal, is exhaustively treated by Mr. Justice Treanor in the case of *In re Bell,* 19 Cal. 2d 488.

With reference to the claim of misconduct on the part of the district attorney, which from time to time is urged in criminal appeals, it might not be amiss to quote the words of Chief Justice Hughes of the United States Supreme Court in *Viereck v. United States,* 87 L. Ed. Adv. Ops. 528; 63 Sup. Ct. Rep. 561, wherein he said, speaking of the conduct of prosecuting officers:

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection. The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. **He may prosecute with earnestness and vigor**

> —indeed, he should do so. **But, while he may strike hard blows, he is not at liberty to strike foul ones.** It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In conclusion, may I not say that our courts are the guardians of the inalienable, fundamental, and natural rights of the individual. In times of great public excitement—political or otherwise—the citizen who has incurred censure in certain quarters would have scarcely a remnant of protection left unless the courts held fast to the rights of the individual to "due process of law" and to a trial in accordance with accepted and proven safeguards against injustice, in accordance with the meaning and intent of the constitution and statutes in so far as such a trial can be made a certainty within the bounds of average human ability, attended by its inevitable imperfections and frailties.

For instance, a spectator might, for the moment, look in safety and with complaisance upon the barbaric tumult of a mob, if he happened to be in sympathy with the present design of such mob; but let the fury of another mob be directed against him or those whom he knows or believes to be innocent, and he will appreciate at once the value of legal protection. So, also, he may look lightly upon the spectacle of a jury packed for the purpose of prosecuting one whom he believes to be guilty; but, if such a course were pursued toward him or his friend, he would immediately have clear views of personal security, constitutional rights, and the sanctity of a jury trial. Under the best system that human wisdom can devise, an innocent man will, at long intervals, be punished and a guilty one go free; but that a government of law preserves liberty is proven and has been established over a long period of human experience.

I shall close with the words of Chief Justice Hughes uttered in 1928 when speaking of the United States Supreme Court, wherein he said:

> "In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interest or prejudice . . . The Supreme Court is the embodiment of this conception of our law, the exemplar of its application, and the assurance that in the complexities of an extraordinarily expanded life, we have not forgotten the ancient faith by which we have pledged ourselves to render to each one his due,—a faith which alone makes it possible to look to the coming years with confidence as well as hope."

We, as lawyers, realize the age-old struggle between liberty and authority. Let's dedicate ourselves and our judicial processes to the end that authority shall not impinge upon liberty and that liberty shall not impair authority.

OUR BILL OF RIGHTS —WHAT MAKES IT WORKABLE

By William C. Mathes, of the Los Angeles Bar

AS the Federal Convention neared the end of its four-month session in mid-September of 1787, Colonel George Mason, one of the delegates from Virginia, urged the inclusion in the Constitution of a Bill of Rights, suggesting that such a declaration of personal rights "would give great quiet to the people." But the Convention, by a tie vote, rejected the proposal.

Events of the next two years demonstrated the soundness of Colonel Mason's observation. When Washington took the oath of office as first President of our newly formed government on April 30, 1789, the Constitution had been ratified by only eleven of the thirteen states, and by only the smallest of margins in the four most populous states—Massachusetts, New York, Pennsylvania and Virginia.

The people would not be quiet unless the Constitution expressly reserved to them what our revolutionary forefathers considered to be but the natural rights of man. And some of the states ratified the new Constitution upon the condition that amendments to secure those "natural rights" be presented to the first Congress.

So when the first Congress met in 1789, James Madison presented to the House of Representatives, and Congress adopted, a series of amendments designed to limit the power of the Federal government over the internal affairs of the people. Ten of these amendments were ratified by the thirteen states and became a part of our Constitution in December, 1791.

We call them our Bill of Rights:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peacefully to assemble, and to petition the Government for a redress of grievances . . . " and so on.

A body of noble words. But what do they mean? Webster's New International Dictionary tells us that freedom is the quality or state of being free; and that being free means being uncontrolled, unrestrained.

Manifestly, "freedom of speech" does not connote the right of a person to say whatever he pleases, wherever he pleases, whenever he pleases. As that great Justice Oliver Wendell Holmes once pointed out: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

Nor does "freedom of the press" license the publication of indecent and obscene works, or the defamation of persons.

Despite the language of the Bill of Rights, our speech and our press are not, strictly speaking, free; Congress may make laws limiting freedom of speech and of the press.

Indeed, Congress has enacted such laws limiting our rights to speak and print what we please—particularly during wartime.

The right to discuss, to defend, to challenge being essential to the preservation of a democratic state, our goal must be to maintain a system whereby freedom of speech and press will be restrained to the extent—and only to the extent—found necessary to prevent violence to the democratic process itself. But who is to determine the extent of that restraint?

For example, nowadays the O.P.A. is a popular target for our priceless but never-valued-until-suppressed right to criticize government and those who man its agencies. Since there are admitted limitations upon freedom of speech and press, what is to prevent Congress from effectively declaring that the O.P.A. is an essential agency in the prosecution of the war, that criticism of the agency impedes the war effort, and that whoever shall hereafter make any derisive remark concerning the O.P.A. shall be punished by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both.

Broadly stated, what is to prevent each succeeding Congress from tailoring the phrases "freedom of speech, or of the press" to suit the personal views of the members? What makes our Bill of Rights workable?

Ours is a constitutional democracy. Our Federal Constitution sets up a governmental structure comprised of three divisions: Legislative, Executive, Judicial. In theory, each department checks and balances the others. The Legislative branch makes the laws; the Executive administers the laws; and the Judiciary determines their constitutionality—decides whether the laws as enacted by Congress, or as administered by the Executive, violate any of the provisions of the Constitution.

Hence it is our courts—ultimately the United States Supreme Court—which restricts the actions of Congress within the framework of the Constitution. Nevertheless, as we have seen, "freedom of speech" and "freedom of press" are phrases of undefined content. Therefore, you may well observe that since judges are human, just as are the members of Congress, what is to deter the judges from defining our freedoms to suit their own personal views.

Many Americans today assume that our judges—like those of Continental Europe and Asia—merely read the words of a statute or ordinance, and then interpret and apply that law according to their personal views as to what was intended. They think that only the judge's personal sense of justice is there to guide him.

That is the case in most countries of the world today. In Germany, for example, one may be tried and condemned for doing anything the judges may happen to think is punishable "according to a healthy sense of justice."

You will recall the scene from Alice in Wonderland when little Alice timidly complained to Humpty Dumpty, "I don't know what you mean by glory." And Humpty Dumpty replied in scornful tone: "When I use a word, it means just what I choose it to mean—neither more nor less." So with the German judge. To him, a "healthy sense of justice" means whatever he chooses it to mean from day to day.

And it may be interesting to recall that when Japan revised her laws a half century ago, the German codes were chosen for a model.

German judges may indulge in the Humpty Dumpty philosophy, but our judges are forbidden to do so. Forbidden by whom—you may inquire—since there is no word in the Con-

stitution on the subject. The answer is: Our judges are forbidden to interpret American freedoms to suit their personal whims and caprice, by principles which were known to our common law even before men were free to plan a written Constitution with a Bill of Rights.

And what is the common law The common law is not a fixed body of rules, but a group of principles which have arisen from the customs and traditions of the English-speaking peoples through the centuries; principles based upon the consent of the governed and sustained by public will.

The common law came with the first English Colonists. Almost two centuries of Colonial life in America were influenced by the common-law system of justice before we adopted the Federal Constitution.

Thus our Colonial ancestors—our founding fathers—were familiar with the spirit and the principles of the common law. The Declaration of Rights adopted by the Continental Congress in 1774 asserts that "The respective colonies are entitled to the common law of England. . . ."

With the coming of Independence and the adoption of our Constitution, this common-law system remained to grow and flourish throughout our land, displacing the French law in Louisiana, Florida and the vast territory of the Mississippi, dethroning the Spanish law in California and the Southwest, and serving as the mechanism which gives meaning and life to the freedoms reserved to us in our Bill of Rights.

You will ask how it is that our common-law system prevents judges from declaring the words of the Bill of Rights to mean just what the individual judges choose them to mean.

There are two fundamentals which guide our judges. Basically, the common law is founded upon the idea that reason—not arbitrary will—should control; that the lawfulness of human conduct should be measured by principles, rather than according to the personal notions of the judge.

It is the first fundamental that established legal principles—rather than some judge's personal view of what certain words mean—shall be the guide to the decision of the court. This, in brief, is the ideal of the supremacy of the law, whence comes

our proud boast that we have a government of law and not a government of men.

This common-law precept of the supremacy of law means that the sovereign—government and all the agencies thereof—must base their decisions and their acts upon principles, and not upon arbitrary will; must conform to reason, instead of being free to follow whim or caprice.

In other words, our common law establishes certain legal principles as supreme, and requires every judge to look to those established legal standards whereby to measure, objectively, the lawfulness of human conduct. Thus, the judge is in effect forbidden to diminish the content of your freedom or mine so as to suit his personal subjective notions of what that freedom should be.

It is, I think, the outstanding characteristic of our common-law system that no one is above the law. What the Judges of England told James I in 1612 holds true in America today;—every official of Government is "under God and the law." That is to say, the law stands in scrutiny of the acts of every official, as well as those of every private person, to see to it that the official keeps within the limit of his authority, and the private individual within the limit of his liberty.

The other common-law fundamental, which protects us from the individual prejudices of the judge, is known as the doctrine of judicial precedent. Its professional name is *stare decisis,* but it isn't as formidable as that bit of Latin sounds. The doctrine of judicial precedent admonishes our judges always to look to the experience of their predecessors and not to depart from the teachings of that judicial experience without legal reason. Here again, reasoning from recognized legal principles —rather than the individual notion of the judge—is the ground of decision.

The common-law tradition of looking to the experience of prior judicial action in a given case as a guide to decision forges the anchor link of the chain between past, present and future, and gives both an orderly continuity and a comparative certainty to the scope of your individual freedom and mine under the Bill of Rights.

To be sure, judges do not always reason to the same result.

It is a maxim of our law that when the reason for a rule ceases, so should the rule itself. Judges often disagree as to when the reasons for a given rule have ceased to exist. But this, in the long run, is a happy circumstance because it assures a healthy growth, marked by adaptability to meet the changing conditions and affairs of our ordered society.

You may have noticed of late that some of the Justices of the United States Supreme Court are accusing each other of disregarding the doctrine of judicial precedent without legal reason. With all due respect to our newspapers, this is not a mere battle of personalities, but a sincere and for the development of the law an often desirable difference of judicial opinion.

We frequently hear lawyers and judges deplore the increasing tendency of Congress and the Legislatures over the past forty years to create Boards and Commissions to solve our problems, delegating to those agencies executive, judicial and even legislative powers. Our legislators have borrowed this administrative technique from Continental Europe. It is essentially foreign to our common-law method.

When tempted to praise the efficiency with which these tribunals dispense administrative justice, we should not forget that grave danger to your freedom and mine lies in the fact that the members of many of these Boards and Commissions are untrained in the fundamentals of the common law and act, not objectively upon legal principles, but subjectively upon their personal notions, making arbitrary rules that have the force of law.

Our national history has taught us that in order for free men to preserve their individual liberty, they must maintain a government of law, as distinguished from a government of men. That is to say, they must see to it that they are governed by law—and not ruled by men.

We have been able to maintain a government of law because we have adhered to our two common-law fundamentals—that the law, rather than the personal whim of the judge, must always stand as the supreme ground of decision; that precedents set by judicial experience of the past must be looked to as a guide for decision, and not departed from without legal reason.

These two fundamentals, together with trial by jury, comprise the three distinctive institutions of the Anglo-American legal system. We have nurtured and developed them throughout our national history Together they make possible individual freedom under law for all of us.

Yes, all of us—not alone American citizens but every human being who resides on American soil. The human liberties guaranteed in our Bill of Rights are for the benefit of all who live under the protection of the Stars and Stripes. Our flag protects the rights of every color and creed—whether Caucasian, Mongolian or Negro—whether Protestant, Catholic or Jew.

Today we hear all too many people express views indicating a belief that some are better entitled to the benefits of our Bill of Rights than others of us. Recently our District Attorney, speaking at a luncheon in commemoration of the Bill of Rights, voiced the indignation we all feel toward Japan. He characterized the return to Los Angeles, by permission of the Army, of a Japanese—an American citizen— as "an alarming coincidence," saying "Yes, the Japs have kept their word, the second invasion of Pearl Harbor has begun—infiltration has started again." In the next breath the District Attorney is quoted as urging eternal vigilance to protect "our way of life."

Now I yield to no one in the depth ot my feeling against Japan and all it stands for. I believe my abhorence of those unspeakably barbarous Japs who are an enemy is as great as that of anyone who has not endured the torture of first-hand experience. But I deplore with like conviction the remarks, however well intentioned, of the man who is charged by law to serve as guardian of the liberties of the people—urging that some citizens should be denied the protection of our Bill of Rights.

Another and not uncommon example appeared in the newspapers. The International Teamster, official organ of the A. F. of L. Teamsters Union, is quoted as reporting that the Union's recent Seattle Convention voiced the popular stand against the return of Japanese to the Western States. "No Japs wanted now *or ever* is the attitude of the Western Conference of Teamsters," the article states, and continues: "Regardless of the action of Federal authorities, the teamsters will not ac-

cept the Japs . . . This is not an abstract problem that can be settled by theoretical reformers. It is a hard, practical problem that must be solved in a hard, practical way."

As we all know, the Teamsters Union is one of the most vocal organizations in this country in asserting and defending the Constitutional rights of its members. I admire any American citizen who fully exercises the liberties secured to him as a free man living under the protection of our Constitution. By the same token, I admire the responsible exercise by the Teamsters Union of their Constitutional freedom of speech and of the press.

But the Teamsters Union should be reminded that the identical provisions of our Constitution and Bill of Rights which give them the liberty to organize, to strike, to picket—yes, and even to speak and to write the opinions they have expressed with respect to the return of Japanese-Americans to the Pacific Coast —secure to those Japanese-American citizens the right to return here or to go to any other state in the Union.

Under our Bill of Rights the Japanese-American has the same rights, the same liberties, the same freedoms as you or I or the Teamsters Union or the District Attorney has—neither more nor less.

Let us all remember that in this land of ours there is only one class of citizenship, and that every American citizen stands equal before the law. And when we are tempted to let the drugs of bigotry and racial intolerance debase our thinking, let us never forget, now and in the days to come, that the rights of good men are secure only if the rights of bad men also be protected.

The men who won our independence were not softies, nor were they theoretical reformers. At the time they drafted our Bill of Rights they had just been through seven years of war, followed by seven years of depression. They were, if you please, hard, practical men, who set about to solve their seemingly insuperable problems in a hard, practical way. And they believed—out of their bitter experience with a tyrranical King and an arbitrary Privy Council—that the nation they were building could not grow strong and great unless men were free to interchange and debate their ideas—unless the right of free speech

and freedom of the press were to be preserved through good times and bad—during war as well as in peace. When they put on the great seal of the United States the words *novus ordo saeclorum*—a new order of the ages—they meant it.

Today we may well reflect how wise these revolutionary ancestors of ours really were. Just three years ago, when that tragedy at Pearl Harbor struck, we were a military weakling. True to the traditions of a freedom-loving people, we went to work. And only a few days ago the British Prime Minister was prompted to rise in Parliament and assert without qualification that these United States of America—this nation of free men grown through only eight generations from thirteen Atlantic seaboard colonies—today comprise the mightiest power in all the earth. Thus have we justified the faith of those who were first to enthrone a written Constitution—a written charter of personal rights and liberties—as the supreme law of a land. Thus have we provided eloquent evidence of the correctness of Woodrow Wilson's belief that the "highest and best form of efficiency is the spontaneous cooperation of a free people."

Our growth into the majestic power we are today is, I believe, attributable to the freedom we enjoy under a Constitution and Bill of Rights administered according to the principles of the common law. Let those who would doubt it compare our lot with that of our good neighbors to the south, whose vast lands of untold resources were opened through exploration and settled much earlier than our own. Their system of justice is not that of the common law; our tradition of the supremacy of law is unknown to their system of government. They have the so-called civil-law system inherited from Continental Europe — a system akin to that of Germany and Italy and Japan. Under that system, the law is usually whatever is declared by official decree. And the words of their constitutions—more "modern" than our own—mean whatever the judges choose them to mean. Under their system, government officials are the final judges of their own powers. Under our common-law system, whatever a government official does must be done according to law; he is bound by the law equally with the private individual.

I believe the American people should understand more about our common-law system of justice and how it makes our Bill

of Rights workable, that they may be justly proud of it, that they may appreciate the reasons why we should preserve and improve it—and extend its blessings to other peoples.

Only a few weeks ago the American Society of Newspaper Editors announced a campaign to crush "all political, economic and military barriers to freedom of world information." Such freedom, the editors rightly maintain, is vital to enduring peace and is a "keystone to world law and order with justice based on the consent of the governed."

We know now that our own individual freedom can never be really safe here until government according to law is established among the majority of the peoples of the earth. We realize that those wonderful products of the ingenuity of free men—the radio and the airplane—have so diminished the protection once lent by distance that widespread freedom in one part of the world and widespread tyranny in another can never again exist in peace.

That is why Americans fight and die today—not to gain nor to hold the territory or wealth of any people—but solely to preserve and extend the supremacy of law, and thus make secure our individual freedom under law .

Today all of us look to the Bill of Rights as the covenant securing our individual freedom. The Bill of Rights contains the words, but it is the system of our common law which gives assurance that those words shall never fall victim to Humpty Dumpty's philosophy.

That is why I believe that the foremost claim of English-speaking peoples to world leadership must be founded upon the fact that we have developed this common-law system—a system of justice that is reasonably predictable—a system that prizes the dignity of the individual man as an end within himself—a system whose constant goal is our democratic ideal of equal justice under law—a system that stands today as the best design for human liberty known to man.

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